



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NUMBER 254 OF 2004

FRANCIS KAMAU NG'ANG'A.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....DEFENDANT

CONSOLIDATED WITH CIVIL CASE NUMBER 1102 OF 2005

STANLEY NJOROGE MUNENE.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....DEFENDANT

RULING

The Applicants herein have moved this court by way of a Notice of Motion dated the 20th day of November, 2018 under Order 4 & 1 Rule 1(a) and 2(1) and Sections 3A and 3 of the Civil Procedure Act seeking orders for review and amendment of the judgment delivered on the 5th day of July 2018.

The application is made on the grounds that the court granted prayer for aggravated damages to each Plaintiff at Kshs.500,000/- in the body of the judgment but left out the amount I the judgment summary.

The applicants have sought a review and amendment of the judgment to include special damages being the amount incurred as legal fees as pleaded at paragraph 14 of the plaint.

The Applicants avers that the judgment has a mistake apparent on its face in that the judgment states that the 1st Plaintiff did not plead and proof special damages, yet he gave evidence in support of the claim for special damages and produced receipts in court. That due to the error the Applicants are unable to extract the decree and reap the benefits of the judgment.

In a replying affidavit sworn by Mwhaki Gathoga on 17th December, 2018 she avers that, it is trite law that special damages have to be specifically pleaded and strictly proved. She deponed that the 1st Plaintiff cannot e said to have proved special damages as there was a lot of inconsistence's in the receipts that he produced I court to support his claim and he was at a loss to explain the inconsistence's on the amounts claimed as special damages. She contended that the judgment cannot be said to have a mistake on account of not awarding the 1st Plaintiff special damages as the as the court considered the evidence and rightly concluded the special damages were not proved and thus declining to award them. She maintains that there was no error apparent on the face of the record.

The remedy of review is provided for under Order 45 Rule (1) of the Civil Procedure Rules and Section 80 of the Civil Procedure Act. Order 45 (1) provides:-

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the

face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

The foregoing provisions are based on Section 80 of the Civil Procedure Act which provides: -

“ Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

It, therefore, follows that the Applicant seeking an Order for review needs to satisfy the court: -

- a) There is a new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree or order was made.
- b) There is some mistake or error apparent on the face of the record.
- c) Or for any other sufficient reason.

The Applicants herein have sought for review on account of an error apparent on the face of the record. In the case of **Draft and Develop Engineers Limited Vs National Water Corporation & Pipeline Corporation [2014] eKLR**, the court had this to say about an error apparent on the face of the record.

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal”.

The court has considered the application and the replying affidavit. I have also perused my judgment delivered on the 5th July, 2018. On pages 16 -17 the court found that the Plaintiff's had made a case for aggravated damages and awarded Ksh.500,000/- to each of them. It is, therefore, correct that the court made an error in that regard in the final tally on damages by failing to include the figure.

On special damages and with regard to the 2nd Plaintiff the court has carefully perused the contents of the amended pliant amended on 20th June, 2007 and file don 26th July, 2007. He has not pleaded any special damages at all. It is trite law that special damages have to be specifically pleaded and strictly proved. It is also tribe that a party is bound by its pleadings and therefore, it matters not that receipts were produced. In evidence, as along as the specials were not pleaded the 1st Plaintiff's evidence by way of production of receipts amounted to nought.

The court, therefore, finds that there was no error apparent on the record with regard to the courts finding declining to award special damages.

In the sum of the application is allowed in terms of prayer 2 of the same but prayer 3 is declined. The court makes no order on costs.

Dated, signed and delivered at Nairobi this 28th day of March, 2019.

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L NJUGUNA

JUDGE

In the presence of

..... *for the Plaintiffs*

..... *for the defendants*